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No. 75-157

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER P. LIEBERT, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Davis v. *Alaska*, 415 U.S. 308	7
Dennis v. *United States*, 384 U.S. 855	7
DeVita v. *Sills*, 422 F. 2d 1172	6
Getman v. *National Labor Relations Board*, 450 F. 2d 670	10, 11
Jencks v. *United States*, 353 U.S. 657	7
Pointer v. *Texas*, 380 U.S. 400	7
Robles v. *Environmental Protection Agency*, 484 F. 2d 843	10
Roviaro v. *United States*, 353 U.S. 53	7
United States v. *Andolschek*, 142 F. 2d 503	7
United States v. *Coplon*, 185 F. 2d 629	7
United States v. *Gamboa*, 483 F. 2d 427	7
United States v. *Greenlee*, 380 F. Supp. 652, affirmed, No. 74-2106, C.A. 3, decided May 28, 1975, petition for a writ of certiorari pending, No. 75-151	4, 11
United States v. *Nixon*, 418 U.S. 683	7
United States v. *Reynolds*, 345 U.S. 1	7

Statutes: Page

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6103 5
Section 6103(f) 8
Section 7203 2

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 16(b) 6, 8, 10

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OPINIONS BELOW

The opinion of the district court is reported at 383 F. Supp. 1060. The court of appeals' opinion is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1975. The petition for a writ of certiorari was filed on July 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was not entitled to discovery of copies of lists prepared by the Internal Revenue Service containing the names of probable nonfilers of tax returns, in connection with his defense against a charge of failure to file tax returns.

STATEMENT

On December 21, 1973, petitioner was charged with willful failure to file income tax returns for the years 1967 through 1969, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. (Pet. App. A4). The district court dismissed the information because of the government's failure to comply with a discovery order that directed the production of a list of names and addresses of individuals whom the Internal Revenue Service had selected for investigation as probable nonfilers of tax returns during the years 1970 and 1971 (Pet. App. A20). The court of appeals reversed and ordered the information against petitioner reinstated (Pet. App. A3-A19). The sole question presented by the petition is whether petitioner is entitled to discovery of the Internal Revenue Service's list of probable nonfilers.

The circumstances concerning the district court's dismissal of the information are as follows: Shortly after pleading not guilty, petitioner moved in the district court (R. 8-9)[1] for an order permitting his

[1] "R." and 'Supp. R." references are to the separately bound record appendices in the court of appeals.

experts to have access to all computers and computer programs at the Mid-Atlantic Service Center of the Internal Revenue Service, for a period not to exceed three weeks, for the purposes of analyzing the reliability of any report by those computers that petitioner had failed to file income tax returns for the years 1967, 1968, and 1969. In support of this motion, petitioner asserted that he had filed income tax returns for the years in question (R. 8). The only evidence he offered in support of his assertion that he filed income tax returns was indirect. The investigating Internal Revenue agent testified that petitioner told him that he had filed returns for the years at issue (R. 193) and that all records that would corroborate the fact that he had filed had been lost (R. 194). However, petitioner did not testify, submit any affidavits, or produce any records (*i.e.*, cancelled checks or retained copies of income tax returns) in support of his claim, despite the fact that the government offered to dismiss the information upon petitioner's production of his allegedly filed tax returns and/or cancelled checks establishing payments of the tax liabilities for the years at issue (see R. 13).

At an ensuing hearing, petitioner presented an expert who testified that, if the discovery motion were granted, he would be able to analyze and evaluate the reliability of the system being used by the Internal Revenue Service to discover nonfilers of tax returns (R. 128-129). After additional hearings and arguments, an order was entered on October 23, 1974,

granting petitioner's request for access to the Mid-Atlantic Service Center for the purpose of analyzing and testing the Internal Revenue Service's electronic data processing system (R. 2; Supp. R. 1-6).[2]

On February 28, 1974, petitioner filed a second discovery motion (R. 40-43) in which he sought production of all records indicating the number of notices issued by the Internal Revenue Service for the years 1967 through 1973 to taxpayers advising them that their tax returns had not been received and requesting an explanation of their failure to file.[3] The government opposed the motion, arguing, *inter alia*, that disclosure of the requested lists "would involve a gross violation of the privacy" of the persons whose names appeared on the lists (R. 469). Although it opposed petitioner's motion, the government indicated that it was willing to produce for examination the Internal Revenue Service employee who had developed the lists and was responsible for their maintenance and use (R. 471-477, 481-484).

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[2] The Internal Revenue Service agreed to comply with this order and began to implement it.

[3] Petitioner learned of the existence of such lists when an Assistant United States Attorney introduced one page of such a list into evidence in another case involving a failure to file income tax returns (*United States* v. *Greenlee*, 380 F. Supp. 652 (E.D. Pa.), affirmed, No. 74-2106, C.A. 3, decided May 28, 1975, petition for a writ of certiorari pending, No. 75-151). The defense in *Greenlee* presented a witness who testified that, despite the fact that his name appeared on the list, he had never received the notice which the list indicated had been issued to him and that he had in fact filed his income tax return for the year at issue.

On October 22, 1974, the district court ordered the government to furnish petitioner a "mutually agreeable portion of the lists" (R. 496). The court concluded that petitioner's interest in the adequate preparation of his defense outweighed any invasion of privacy that might be suffered as the result of production by those whose names appeared on the lists (Pet. App. A26-A30). After being informed that the Commissioner of Internal Revenue had determined that the lists should not be produced, the district court dismissed the information (R. 502, 504-507).

The court of appeals reversed and remanded the case to the district court with directions to reinstate the information against petitioner. It held that while the lists were material to the preparation of petitioner's defense, the privacy interest of those persons whose names appeared on the list was weighty (Pet. App. A14-A16). In the court's view, this privacy interest, coupled with the fact that production of the lists posed significant problems of managing the evidence at trial and the possibility that the trial would deteriorate into a series of minitrials (Pet. App. A17-A19), outweighed petitioner's need for these lists.[4]

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[4] The court of appeals rejected the government's argument that disclosure of the lists was barred by Section 6103 (Pet. App. A7-A11). While we believe that the disclosure of the names of persons suspected by the Internal Revenue Service not to have filed tax returns is barred by that statutory provision, we confine our discussion here to the privacy interest ground upon which the court of appeals rested its decision.

ARGUMENT

1. The court of appeals correctly concluded that petitioner, charged with failure to file income tax returns, could not discover lists of persons suspected by the Internal Revenue Service of not filing income tax returns. He sought this information in order to prove the inaccuracy of those lists as part of his defense. However, petitioner has never accepted the government's offer to dismiss the charges against him upon his production of documentary evidence (which would presumably be in his possession) that he filed the returns in question. Thus, the decision below properly rejected petitioner's attempt to convert his trial for failure to file income returns into an inquiry as to whether other persons, who are not parties to the case, had not filed returns.

Petitioner argues (Pet. 15-22) that the decision of the court of appeals deprived him of due process of law and of his right to confront and cross-examine the witnesses against him. However, the right of discovery in a criminal case does not include the right to production of any and all information which may be useful to the defense. See *DeVita* v. *Sills*, 422 F.2d 1172, 1181 (C.A. 3). Indeed, Rule 16(b) of the Federal Rules of Criminal Procedure itself requires "a showing of materiality to the preparation of * * * [the] defense and that the request is reasonable."

The decision of the court of appeals will not deny petitioner's rights in the conduct of his defense. The

purpose of petitioner's discovery request was to impeach the reliability of computer evidence. But as the court of appeals noted (Pet. App. A18-A19), there were alternative means of securing the information that petitioner sought. Thus, a refusal to produce the lists would not deny due process of law or the petitioner's right to confront the witnesses against him, since the lack of access to the lists would not preclude petitioner from impeaching the reliability of the computer evidence. As the court of appeals noted (Pet. App. A17), the cases upon which petitioner relies (Pet. 15-16, 20-21)[5] "do not control here because they involve discovery from the only available source of information." Here, the availability of alternative means for discovering the information sought makes it impossible to conclude that the decision holding that the lists should not be produced denied petitioner the right adequately to prepare his defense. See *United States* v. *Gamboa*, 483 F.2d 427, 428 (C.A. 9).

Contrary to petitioner's assertion (Pet. 26), the court of appeals did not "balance away the accused's * * * right to discovery of relevant, specified information." To the contrary, the court balanced petitioner's interest in production against the privacy interests of those whose names appeared on the lists.

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[5] *Roviaro* v. *United States*, 353 U.S. 53; *Jencks* v. *United States*, 353 U.S. 657; *United States* v. *Reynolds*, 345 U.S. 1; *Davis* v. *Alaska*, 415 U.S. 308; *Pointer* v. *Texas*, 380 U.S. 400; *United States* v. *Nixon*, 418 U.S. 683; *Dennis* v. *United States*, 384 U.S. 855; *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2); *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2).

Since alternative means were available for petitioner to test the reliability of the computer lists, the decision below correctly concluded that the need for protecting the privacy of individuals having no connection with the trial outweighed petitioner's interest in obtaining the lists. Under these circumstances, the decision did not deprive petitioner of his rights to due process or to confront the witnesses against him.

2. Despite the careful balancing of the interests by the court of appeals, petitioner contends (Pet. 23-26) that it erred in concluding that the district court abused its discretion under Rule 16(b) of the Federal Rules of Criminal Procedure in ordering the discovery requested. In petitioner's view, the privacy interest of those whose names appear on the lists is "minor and elusive" (Pet. 18), and the alternative discovery available is inadequate because it is "a hollow substitute" for the information which he sought (Pet. 24, n. 5).

Under the "reasonableness" standard of Rule 16 (b), petitioner was not entitled to request lists of names and addresses of people whom the Internal Revenue Service suspected were required to file tax returns and has selected for investigation as probable nonfilers.[6] As the court of appeals noted (Pet. App.

[6] Petitioner further argues (Pet. 21 n. 4, 23) that the identity of those who have not filed tax returns is public information under Section 6103(f) of the Internal Revenue Code of 1954. But that section merely requires the government, in response to a request, to furnish information showing whether a particular person has or has not filed an income tax return for a particular year. There is a vast difference between an inquiry as to whether a particular person has or has not filed a tax return for a particular year and a request for a list of those persons who have been identified as probable nonfilers of tax returns.

A15-A16), "being a suspect under investigation by a government agency is a circumstance which every person except the bizarre would prefer to hold in confidence," and contact "by a stranger [*i.e.*, petitioner] about a failure to file a tax return well may prove disturbing to an individual" whose name appears on the list. Thus, the court correctly concluded that the privacy interest of the persons whose names appear on these lists, strangers to this litigation, was "weighty" (Pet. App. A14).

Moreover, apart from the fact that the government offered petitioner an alternative means of challenging the accuracy of its nonfiler lists,[7] it also offered to conduct tests demonstrating the retrieval of a number of actual tax returns of taxpayers whose authorizations had been obtained (Pet. App. A19). The court

[7] The government offered to make available to petitioner: (1) all the relevant Internal Revenue Service handbooks documenting the procedures, machine operations, and other relevant information pertaining to its electronic data processing system; (2) statistical analysis relating to the Service's ability to discover and report accurately failures to file returns; (3) an expert familiar with all aspects of the nonfiling lists; (4) an expert familiar with all aspects of the processing of work through the Mid-Atlantic Service Center; and (5) an expert who had made studies on the reliability of the Service's data processing system (Pet. App. A18-A19). The government also offered to allow petitioner's computer experts to run any test on its computer system not unreasonably interrupting the Service Center's operations (Pet. App. A19).

of appeals also required that the government supply information as to the number of persons whose names appeared on the lists as nonfilers due to computer error (Pet. App. A19, n. 19). In view of the availability of such alternative discovery, the court of appeals correctly concluded that petitioner's request would unreasonably invade the privacy interests of innocent persons.[8]

3. Contrary to petitioner's argument (Pet. 24-25), the decision below does not conflict with *Robles* v. *Environmental Protection Agency*, 484 F.2d 843 (C.A. 4), and *Getman* v. *National Labor Relations Board*, 450 F.2d 670 (C.A.D.C.). Those cases both involved requests for information under the Freedom of Information Act, 5 U.S.C. 552, where the courts rejected the claim that the information sought was exempt from disclosure under Section 552(b)(6) as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Apart from the fact that the standards for disclosure under the Freedom of Information Act are different than those under Rule 16(b) of the Federal Rules of Criminal Procedure, the cases are distinguishable.

[8] The court of appeals also noted that since petitioner sought to use the lists to locate persons he could call to testify that they had filed despite the fact that they were listed as nonfilers, the discovery sought could lead to "a series of mini-trials centered upon the reasons individuals, not defendants in the case, were listed as nonfilers" (Pet. App. A17) and thereby obscure the issue whether petitioner filed income tax returns for the years at issue.

In *Robles*, the disclosure of the results of a survey of the radiation levels in homes and public structures where uranium tailings had been used for construction fill was held not to constitute "a clearly unwarranted invasion of personal privacy" because the information had already been given to the Colorado Department of Health, which had made the results of the survey available on request. Indeed, the court noted that the record indicated that no householder had objected to this disclosure (484 F.2d at 846). Here, however, the lists sought by petitioner are not made available by the Internal Revenue Service on request.[9] In *Getman*, the court held that disclosure of a list of names and addresses of employees eligible to vote in certain labor representation elections was not a clearly unwarranted invasion of personal privacy. In so concluding, the court noted its belief that any invasion of privacy was "minor," because "in themselves a bare name and address give no information about an individual which is embarrassing" (450 F.2d at 675). Unlike *Getman*, the disclosure in this case would reveal much more than simply a name and address, but whether the Internal Revenue Service believes that the named persons have not filed tax returns and has selected them for investigation.

[9] Petitioner offers no support for his assertion that "the Government routinely uses computer lists of non-filers as affirmative evidence of guilt in failure-to-file cases" (Pet. 22). Although one page from such a list was introduced into evidence by the government in *United States* v. *Greenlee*, *supra*, the use of one page of such a list in one case hardly establishes routine use of such lists in failure-to-file cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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